Supreme Court, U.S.
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In The

# Supreme Court of the United States

MIGUEL GADDA, an individual,

*Petitioner,*

vs.

NINTH CIRCUIT COURT OF APPEALS;
JOHN ASHCROFT, Attorney General;
BOARD OF IMMIGRATION APPEALS;
EDWARD G. KANDLER; IMMIGRATION COURT,
SAN FRANCISCO; IMMIGRATION
AND NATURALIZATION SERVICE,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Ninth Circuit Court Of Appeals**

## SUPPLEMENTAL APPENDIX

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In Pro Se

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

MIGUEL GADDA, Esq.,
*Petitioner-Appellant,*

v.

JOHN ASHCROFT, Attorney General, U.S. Attorney General; BOARD OF IMMIGRATION APPEALS; EDWARD G. KANDLER; IMMIGRATION COURT, SAN FRANCISCO; IMMIGRATION AND NATURALIZATION SERVICE,
*Respondents-Appellees.*

No. 02-15113

D.C. No.
CV-01-03885-PJH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted April 1, 2004*
San Francisco, California

In re: MIGUEL GADDA, Esq.,
Admitted to the bar of
the Ninth, Circuit:
23 April 1985,
*Respondent.*

No. 02-80014

Original Proceedings

ORDER

* The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

Filed April 1, 2004
Amended July 20, 2004

Before: Robert R. Beezer, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Beezer

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## COUNSEL

Miguel D. Gadda, Esq., San Francisco, California, *pro se* for the petitioner-appellant.

Jocelyn Burton, Esq. and Robert Yeargin, Esq., Assistant United States Attorneys, San Francisco, California, and David J. Kline, Esq. and Hugh G. Mullane, Esq., United States Department of Justice, Washington, D.C., for respondents-appellees John Ashcroft, United States Attorney General, and Board of Immigration Appeals.

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## ORDER

Pursuant to our April 1, 2004 order and opinion, Miguel Gadda, Esq., was disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit pursuant to Federal Rule of Appellate Procedure 46(b)(1)(A). Respondent Gadda has filed a motion to recall the mandate and amend the April 1, 2004 order and opinion.

The court on its own motion recalls the mandate. The April 1, 2004 order and opinion is amended as follows: The two paragraphs on slip op. 4046-47 that read:

> Within 21 days of the filing date of this opinion, respondent shall file notices of withdrawal in all cases pending in this court in which he is counsel of record, serve this order on his clients in all pending cases, inform the clients that they

must obtain new counsel, and he shall turn over all client files and materials to the clients. Also, within 21 days, Gadda shall file proof with the clerk of this court that he has completed the above requirements. Gadda shall send to the clerk of this court the full identification of his clients in all pending cases in this court and such identification shall include the following information as to each client:

A. Full name

B. Current mailing address

C. Telephone number, if known

D. The Ninth Circuit appeal file number

E. The BIA appeal file number, if any

The Clerk shall deliver certified true copies of this opinion and order to the Clerks of the Supreme Court of the United States and the United States District Court for the Northern District of California, to the California State Bar and to the California State Bar Association, ATTN: Enforcement Department, 180 Howard Street, San Francisco, CA, 94105, and to the Executive Office of Immigration Review, Office of the General Counsel, ATTN: Bar Counsel, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041. *See* 9th Cir. R. 46-2(g).

are deleted.

The following five paragraphs shall be inserted at slip op. 4046 and substituted for the deleted text:

Within 21 days of the date of this order, respondent Gadda shall file notices of withdrawal in all cases pending in this court in which he is listed

as counsel of record as of June 1, 2004, serve this order and the court's April 1, 2004 order and opinion on his clients in the pending cases, and turn over all client files and materials to the clients. Respondent Gadda shall inform his clients in the pending cases that they must (1) obtain new counsel; or (2) notify the court that they wish to represent themselves; or (3) request that the court appoint counsel for them. He shall further notify them that he can no longer provide any legal assistance for them and may not collect fees for future services. Also within 21 days of this order, respondent Gadda shall file proof with the court that he has completed the above requirements and send to the court the addresses of his clients in all pending cases.

With the above amendments, Gadda's motion is denied. No motions for reconsideration, rehearing, clarification, modification, or stay of the mandate shall be filed or entertained. The mandate shall issue forthwith.

Failure to comply with this order within the time permitted will result in the imposition of monetary sanctions of not less than $1,000, without further notice, for each case in which respondent Gadda fails to fulfill the requirements of this order.

The Clerk shall serve copies of this order on the Clerks of the United States Supreme Court and the United States District Court for the Northern District of California; on the State Bar of California, Attention: Enforcement Department, 180 Howard Street, San Francisco, CA, 94105; and on the Executive Office for Immigration Review, Office of the General Counsel, Attention: Bar Counsel, 5107 Leesburg Pike, Suite

2400, Falls Church, VA 22041. *See* 9th Cir. R. 46-2(g).

The Clerk shall serve this order on Gadda by telephone and by certified mail, return receipt requested.

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## OPINION

BEEZER, Circuit Judge:

On July 30, 2001, the California State Bar Court (the "State Bar Court") found that Miguel Gadda, Esq. repeatedly failed to perform legal services competently. It placed Gadda on involuntary inactive status and recommended that Gadda be disbarred.

This opinion and order relate to two federal proceedings resulting from the State Bar Court's recommendation. In the first, Gadda appeals an order of the United States District Court for the Northern District of California, which denies Gadda's motion to preliminarily enjoin the Board of Immigration Appeals ("BIA") decision to suspend him from practice based on his suspension by the State Bar Court. *Gadda v. Ashcroft,* No. 02-15113. Gadda asserts that the State Bar Court cannot affect his right to practice before the BIA. The other proceeding is a disciplinary action initiated by this court after we received notice of Gadda's suspension from practice by the State Bar Court. *In re Gadda,* No. 02-80014.

Gadda argues that any reciprocal discipline imposed by the BIA or by this court based on the State Bar Court's suspension order is invalid because the Supreme Court of California lacked jurisdiction to discipline him. He claims that federal law preempts the states' authority to regulate

attorneys, like him, who practice only in the administration of immigration law and in the federal courts, but not in the state courts. Because both of these proceedings involve the same underlying preemption issue, we consolidate them for opinion purposes only.

We conclude that federal law does not preempt the Supreme Court of California's authority to suspend or disbar attorneys admitted to practice in California state courts. The Supreme Court of California's discipline orders may serve as the basis for reciprocal disbarment actions by both the BIA and this court.

We disbar Gadda from the practice of law before the United States Court of Appeals for the Ninth Circuit.

## I

Gadda was admitted to the California State Bar in 1975. Thereafter, he was admitted to practice law and became a member of the bar of the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. He was also admitted to practice before the Board of Immigration Appeals ("BIA") and was authorized to appear for clients before the BIA and in all Immigration Courts throughout the United States.

### A. California State Court Disciplinary Proceedings

On August 26, 2002, the Review Department of the California State Bar Court (the "Review Department") affirmed the State Bar Court's decision recommending

Gadda's disbarment and placing him on involuntary inactive status. *In re Gadda,* Nos. 97-O-15010, 98-O-02100, 2002 WL 31012596, at *1 (Cal. Bar. Ct. Aug. 26, 2002). On January 22, 2003, the Supreme Court of California ordered that Gadda be disbarred from the practice of law in California, effective February 21, 2003. *In re Gadda,* No. S111517 (Cal. 2003).

The Review Department's opinion surveyed Gadda's history of federal immigration practice, concluding that "disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession." *In re Gadda,* 2002 WL 31012596, at *1. The Review Department cited seventeen acts of misconduct extending over six years and involving eight federal immigration client matters and one client trust account matter. This misconduct included Gadda's failure to appear at scheduled court conferences and to keep clients apprised of the proceedings and relevant court dates. Five of Gadda's clients were ordered deported in absentia and at least six courts found Gadda to have provided ineffective assistance. The Review Department concluded that Gadda failed "to perform legal services competently, demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and significantly harmed clients." *Id.* at *32; *see id.* at *4-30 (discussing Gadda's misconduct). The Review Department determined that aggravating factors, including prior discipline for similar misconduct in 1990, *see Gadda v. State Bar,* 787 P.2d 95 (Cal. 1990), out-weighed any mitigating factors Gadda presented. *Id.* at *30-33.

We incorporate by reference that portion of the Review Board's opinion which inventories Gadda's incompetence between 1994 and 1999. Of the eight federal immigration

client matters which the Review Board describes, that of the Saba family is especially egregious.

The four minor Saba children applied for political asylum. After the INS denied their application, the children retained Gadda to represent them. Gadda advised the children to withdraw their asylum claim; the Immigration Judge ("IJ") ordered that they voluntarily depart from the United States. Thereafter, the children's parents became naturalized citizens. The children were eligible for priority consideration of their application for adjustment of status to legal residency or citizenship based on their parents' naturalization. However, as a result of Gadda's neglect and incompetence, the children were deprived of an adjustment of their immigration status, and ultimately were placed in deportation proceedings.

Gadda moved for a stay of the children's deportation. In the course of a hearing on that motion, Gadda left the Saba family unrepresented before an immigration officer. Gadda also directed the children to sign a statement promising they would voluntarily depart once the stay expired. The immigration court granted the stay but the children did not depart as promised. Gadda assured the children that he was appealing the earlier BIA decision.

Because Gadda negligently allowed the time for an appeal from the BIA to this court to lapse, he was forced to seek habeas corpus relief before the district court. Gadda directed William Gardner, an attorney Gadda employed on a contract basis but did not supervise, to file the habeas petition. Before Gardner filed the habeas petition, the IJ ordered the Saba children to be deported on account of their refusal to depart voluntarily at the expiration of the

stay. Gadda once again advised the children not to comply with the court's order.

Gardner subsequently filed the habeas petition and the district court ordered a hearing. The district court made a sua sponte finding of ineffective assistance by Gadda and remanded the matter to the immigration court to reopen the deportation hearing. *Saba v. INS,* 52 F.Supp.2d 1117, 1126 (N.D.Cal. 1999). By the time the case was heard, two of the Saba children were no longer minors. Gadda has not refunded the $3,000 the Saba children paid him.

Regarding the Saba matter, the Review Department agreed with the State Bar that Gadda "recklessly and repeatedly fail[ed] to perform legal services" and "failed to refund unearned fees promptly upon termination." *In re Gadda,* 2002 WL 31012596, at *6-7. Specifically, the Review Department found Gadda's performance incompetent in the following ways:

> (1) by leaving the children alone, unrepresented, in the middle of a hearing before an immigration officer and advising them to sign a voluntary departure form; (2) by failing to advise the Saba children to depart on or before [the deadline]; (2) by failing to [timely] move to reopen deportation proceedings . . . ; (4) by failing to file a petition for review with the Ninth Circuit; (5) by failing to file for adjustment of status after Mrs. Saba became a naturalized citizen . . . and instead filing for adjustment of status on the children's last day to depart voluntarily, approximately three months later; and (6) by failing to supervise Gardner in filing a petition for writ of habeas corpus.

*Id.* at *6.

### B. *Gadda v. Ashcroft*, No. 02-15113 – appeal from BIA disciplinary proceedings

Based on the State Bar Court's order, on October 2, 2001, the BIA suspended Gadda from practice before the BIA, the Immigration Courts, and the Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service ("INS").[1] Gadda unsuccessfully sought a preliminary injunction of the BIA's action in the district court. *See Gadda v. Ashcroft,* No. C-01-3885-PJH (Dec. 7, 2001). Gadda appealed the denial of the preliminary injunction to this court. We deferred submission pending the outcome of disciplinary proceedings before the BIA. *See Gadda v. Ashcroft,* No. 02-15113 (9th Cir. Feb. 6, 2003) (order).

Meanwhile, the Office of General Counsel for the Executive Office for Immigration Review ("EOIR") initiated disciplinary proceedings and an adjudicatory official suspended Gadda indefinitely from practice on August 22, 2002. On July 8, 2003, the BIA dismissed Gadda's appeal and ordered him expelled from practice before the BIA, the Immigration Courts, and the DHS. *In re Gadda,* 23 I&N Dec. 645, 649 (BIA 2003).[2]

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[1] As a result of the transfer of the functions of the INS to the DHS, the regulations in chapter I of the Code of Federal Regulations were transferred or duplicated to a new chapter V, and this regulation is now codified at 8 C.F.R. § 1003.105. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9831 (Feb. 28, 2003).

[2] On July 14, 2003, in light of the BIA's expulsion order, the Government moved to dismiss Gadda's appeal as moot. Although the BIA's final order does moot Gadda's appeal from the district court's denial of his preliminary injunction, we address Gadda's underlying preemption issue. As noted, Gadda alleges that federal preemption

(Continued on following page)

### C. Ninth Circuit Disciplinary Proceedings, No. 02-80014

On May 29, 2002, pursuant to Ninth Circuit Rule 46-2(c), we ordered Gadda to resign from the Ninth Circuit's bar or show cause why he should not be suspended or disbarred based on the California State Bar Court's order placing him on involuntary inactive status and recommending that he be disbarred. Gadda responded and we referred the case to the Appellate Commissioner. *See* 9th Cir. R. 46-2(f). On September 25, 2002, the Appellate Commissioner stayed the disciplinary proceedings pending a decision by the Supreme Court of California on the State Bar Court's recommendation or a decision by us in *Gadda v. Ashcroft,* No. 02-15113.

Following the Supreme Court of California's January 22, 2003 order disbarring Gadda, the Appellate Commissioner again ordered Gadda to resign from the bar of the United States Court of Appeals for the Ninth Circuit or show cause why he should not be suspended or disbarred. Gadda requested a stay, claiming that the Supreme Court of California's disbarment order was not final and that we should first resolve *Gadda v. Ashcroft,* No. 02-15113.[3]

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deprives the Supreme Court of California of jurisdiction to suspend him, rendering the BIA's reciprocal disbarment invalid. Gadda raises this same argument with respect to the Appellate Commissioner's recommendation of reciprocal disbarment, discussed *infra.*

In response to the BIA's expulsion order, Gadda appealed to the district court on October 23, 2003. On December 12, 2003, Gadda moved this court "to augment the record and offer opposing counsel to settle cases pending before the district court and the Ninth Circuit or judicial notice of the court's record." We hereby deny Gadda's motion.

[3] Gadda's motion to stay the Supreme Court of California's disbarment order is now moot. The Supreme Court of California has

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The Appellate Commissioner conducted a hearing on March 27, 2003 and filed a report and recommendation on May 22, 2003. The Appellate Commissioner recommends that Gadda be disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit.

## II

"Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *In re Snyder,* 472 U.S. 634, 644 (1985) (quoting *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470-71 (1928) (internal quotations and alterations omitted). We have both statutory and inherent power to suspend or disbar an attorney who has been admitted to this court's bar.

Federal Rule of Appellate Procedure ("FRAP") 46 regulates attorney conduct, including admission to the bar of the Ninth Circuit and the conditions for suspension and disbarment. FRAP 46 provides that a member of this court's bar is subject to suspension or disbarment if the member either (1) "has been suspended or disbarred from practice in any other court"; or (2) "is guilty of conduct

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denied Gadda's motions to reconsider or reopen its disbarment order and his request for a stay of that order. On June 23, 2003, the Supreme Court of the United States denied Gadda's petition. *Gadda v. State Bar of California,* 123 S.Ct. 2618 (2003) (mem.). The Supreme Court of California disbarment order is final. *See* Cal. Ct. R. 953(a).

unbecoming a member of the court's bar." Fed. R. App. P. 46(b)(1)(A).[4]

### A. Reciprocal Discipline

In this case, Gadda's suspension and disbarment from the practice of law in California forms the basis for his disbarment from the BIA and this court. Gadda argues that such reciprocal discipline is inappropriate because the Supreme Court of California did not have jurisdiction to discipline him.

We are not conclusively bound by the State Bar Court's suspension of Gadda or the Supreme Court of California's disbarment. *In re Kramer*, 282 F.3d 721, 723 (9th Cir. 2002); *In re Rosenthal*, 854 F.2d 1187, 1188 (9th Cir. 1988) (per curium). We independently examine the State Bar Court's proceeding.[5] *Kramer*, 282 F.3d at 723. We

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[4] Ordinarily, suspension or disbarment is not appropriate for conduct that is aberrant to an attorney's practice and/or does not affect our ability to function in the public interest. The federal courts, with the approval of Congress, have promulgated disciplinary rules pursuant to their general rule-making authority to regulate this lesser conduct. Fed. R. App. P. 38 (providing for the imposition of "just damages and single or double costs to the appellee" for frivolous appeals); 46(c) (allowing for appropriate disciplinary action); *see Gallo v. United States Dist. Ct.*, 349 F.3d 1169, 1179-80 (9th Cir. 2003) ("Federal courts have inherent and broad regulatory authority to make rules respecting the admission, practice, and discipline of attorneys in the federal courts."). We also have authority under 28 U.S.C. § 1827 to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings.

[5] Because the Supreme Court of California summarily denied Gadda's petition for a writ of review, we examine the Review Department's opinion, which is the final judicial determination on the merits. *See* Cal. Ct. R. 954(b) (State Bar Court recommendation is filed as an order of the Supreme Court upon denial of petition for review).

will extend great deference to the state court's determination unless our independent review reveals one of the following conditions: (1) a lack of due process; (2) insufficient proof of attorney misconduct; or (3) "some other grave reason exist[s] that should prevent the court from recognizing the state court's determination." *Id.* (citing *Selling v. Radford,* 243 U.S. 46, 51 (1917)); *see also Kramer,* 282 F.3d at 724.

Gadda bears the burden of demonstrating, through clear and convincing evidence, that one of the above *Selling* conditions exists. *Kramer,* 282 F.3d at 724-25. We presume the correctness of the State Bar Court's factual findings. *Rosenthal,* 854 F.2d at 1188.

Gadda does not argue directly that any of the *Selling* conditions existed in the California proceedings; instead, he argues more generally that the Supreme Court of California did not have jurisdiction to disbar him. Gadda contends that he practices only federal immigration law and that Congress has granted exclusive authority to the United States Attorney General to discipline attorneys who appear before the BIA, Immigration Courts, and the DHS. He argues that federal law preempts a state's authority to discipline or regulate the conduct of attorneys who, like him, practice exclusively in the immigration or federal courts and, accordingly, the Supreme Court of California lacked jurisdiction to disbar him. Gadda's preemption argument lacks merit.[6]

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[6] Gadda raised this identical issue before the California disciplinary proceedings, where it was addressed and rejected by the State Bar Court Review Department. *In re Gadda,* 2002 WL 31012596, at *1-4. The Review Board stated that the Supreme Court of California has the inherent power to discipline attorneys licensed to practice in the State

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We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation. *See Ting v. AT&T,* 319 F.3d 1126, 1136 (9th Cir. 2003). Gadda does not contend that attorney discipline is such an area. In fact, the opposite is true. The Supreme Court of the United States has long recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 434 (1982); *see also Theard,* 354 U.S. 278, 281 (1957) ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over their officers."); *cf. Matter of Abrams,* 521 F.2d 1094, 1101 (3rd Cir. 1975) (recognizing the "absolute and unfettered power" of the federal courts to admit and discipline members of its bar independently and separately from admission and disciplinary procedures of the state courts).

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of California: "[I]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court." *Id.* at *2 (quoting *Geibel v. State Bar,* 79 P.2d 1073 (1938) (internal quotations omitted)). The Review Department extended this reasoning to apply to federal agencies.

The Supreme Court of California also implicitly rejected this argument when that court denied review of the State Bar Court's recommendation to disbar Gadda. *See In re Rose,* 993 P.2d 956, 973 (Cal. 2000) (Supreme Court of California conducts de novo review of facts and law when attorney petitions for review of State Bar Court recommendation of disbarment).

As noted above, Gadda also raised this issue in *Gadda v. Ashcroft,* No. 15113, seeking to invalidate his suspension by the BIA.

Federal law may preempt state law in three ways: (1) express preemption; (2) field preemption; and (3) conflict preemption. *See Ting*, 319 F.3d at 1135.

Express preemption occurs when Congress enacts a statute that expressly commands that state law on the particular subject is displaced. *Id.* Gadda does not contend that any such statute exists.

Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states. *See Id.* at 1136. In this case, Gadda argues that the regulation of immigration attorneys in California is comprehensively covered by the federal regulatory scheme governing attorney conduct before the BIA, Immigration Courts, and the DHS. Gadda claims that this federal scheme leaves no room for additional attorney regulation by California. The federal regulations provide that an attorney may represent a person in immigration proceedings only if the attorney "is a member in good standing of the bar of the highest court of any State . . . and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law." 8 C.F.R. §§ 1292.1(a)(1) & (e), 1001.1(f). Beyond merely leaving room for supplementary state regulation, the immigration regulations *condition* an attorney's ability to practice in immigration court on the attorney's good standing as a member of the bar of a state court.

We observe that the immigration regulations expressly allow for supplementary state regulation. For example, absent good cause, the BIA must immediately suspend an attorney who has been disbarred or suspended

from practice on an interim or permanent basis by the highest court of any state, territory, the District of Columbia, or any federal court. 8 C.F.R. § 1003.103(a)(1), (2). An immigration attorney also has a duty to inform the EOIR if he or she has been disbarred or suspended by the highest court of any state or territory, or by a federal court. 8 C.F.R. § 1003.103(c). A final order of disbarment or suspension by a state or territory or federal court constitutes a rebuttable presumption that disciplinary sanctions should be imposed by the BIA. 8 C.F.R. § 1003.103(b)(2); *see* 8 C.F.R. §§ 1292.3(c)(3)(ii), 1003.102(e).

The immigration regulations thus promote reliance on and cooperation with the states, territories, and federal courts. They seek to ensure that qualified attorneys practice before the BIA, Immigration Courts, and the DHS, and that their standards for practice are not contrary to the applicable disciplinary rules of other jurisdictions. The federal immigration regulatory scheme does not occupy the field of discipline for immigration attorneys.

Gadda maintains nonetheless that the interpretation of the applicable regulations by the Attorney General acts to preempt the field. Gadda cites the following statement by the Attorney General regarding the most recent amendments to the federal regulations controlling the attorney discipline system in the BIA and Immigration Courts:

> It is imperative that EOIR and the Service administer a uniform disciplinary system among the respective Immigration Courts. For the reasons explained in SSA's [Social Security Administration] supplementary information to their disciplinary rule, EOIR and the Service should not be expected or required to apply numerous local rules, or local interpretations of the rules, to

> problems that require national uniformity. Applying local rules or local interpretations in lieu of a national standard would leave immigration attorneys in one state subject to discipline, while possibly exempting immigration attorneys in another state. EOIR and the Service do not believe that it would benefit the Board, the Immigration Courts, the Service, the public, or attorneys to promote inconsistency in regulating the conduct of practitioners, who all practice before the same forum.

Professional Conduct for Practitioners; Rules and Procedures, 65 Fed. Reg. 39,513, 39,524 (June 27, 2000).

Contrary to Gadda's assertion, the Attorney General's statement merely clarifies that the regulations are designed to implement uniform, nationwide rules of professional conduct for attorneys who practice before the immigration courts; it does not relate to state oversight of that same conduct, nor does it posit that agency oversight is the sole means of regulating immigration attorney conduct. Moreover, the statement goes on to further refute Gadda's interpretation by explaining the necessary cooperation between the federal immigration disciplinary process and that of the states:

> EOIR and the Service anticipate working closely with the various state bars when investigating disciplinary complaints. . . . Cooperation between the federal government and the 51 state bar disciplinary authorities will optimize resources and minimize duplication of investigations. In general, state bars have not been resistant to the Federal government's efforts to

> assist in protecting the public by scrutinizing the professional conduct of attorneys.

*Id.*

Gadda presents no evidence that the Attorney General has intended, through the applicable regulations, to preempt the field of attorney discipline for immigration attorneys.

The third way in which federal law may preempt state law is through conflict preemption. *See Ting,* 319 F.3d at 1135-36. Preemption may be inferred if there is an actual conflict between federal and state law, or where compliance with both is impossible.

Gadda points to no conflict between California's professional conduct rules and the federal regulations for immigration attorneys. The federal regulations clearly contemplate a state scheme and incorporate the results of state disciplinary proceedings into its disciplinary scheme. The two schemes do not conflict. Gadda fails to show that federal regulation of attorneys before the immigration courts preempts state regulation of attorneys by express, field, or conflict preemption. *See, e.g., Berger v. Cuyahoga County Bar Ass'n,* 983 F.2d 718, 724 (6th Cir. 1993). Because the Supreme Court of California had jurisdiction to disbar Gadda, the reciprocal disbarments by the BIA and this court are valid.

### B. Conduct Unbecoming

Even if the California courts had not acted to disbar Gadda, we have independent authority to suspend or disbar him from practice before the United States Court of Appeals for the Ninth Circuit pursuant to FRAP

46(b)(1)(B). Conduct unbecoming a member of the bar of the Ninth Circuit is sufficient cause for disbarment. Unlike some of our sister circuits, the Ninth Circuit has not adopted local rules elaborating on FRAP 46's "conduct unbecoming" standard. *Cf.* 9th Cir. R. 46-2(a). The Supreme Court has held that "conduct unbecoming" is conduct "contrary to professional standards that show an unfitness to discharge continuing obligations to clients or courts, or conduct inimical to the administration of justice." *Snyder,* 472 U.S. at 645.[7] We have consistently found conduct unbecoming where an attorney failed to prosecute an appeal with due diligence. *See, e.g., Matter of Widhey,* 537 F.2d 324, 326 (9th Cir. 1976) (ordering suspension for failure to prosecute appeal); *Matter of Young,* 537 F.2d 323, 324 (9th Cir. 1976) (threatening to suspend or disbar attorney for failure to prosecute the appeal with due

[7] The Supreme Court of the United States has never directly construed its own "conduct unbecoming" language. *See* Sup. Ct. R. 8 (providing for suspension for "engag[ing] in conduct unbecoming a member of the Bar of this court"); *cf. Synder,* 472 U.S. at 643-45 (finding that similarly-worded Appellate Rule 46 was not unconstitutionally vague when read in light of "case law, applicable court rules, and 'the lore of the profession' as embodied in the codes of professional conduct."). In *In re Strickland,* the Court spoke in general terms about its standard for attorneys: "[M]embership in the Bar of the country's highest Court should remain a privilege and a responsibility. . . . [A]n applicant must show . . . that he 'appears . . . to be of good moral and professional character.'" 453 U.S. 901, 909 (1981) (mem.); *see also Selling,* 243 U.S. at 49 (interpreting predecessor to Rule 8 as requiring "the continued possession of a fair private and professional character"). On those occasions where the Court has applied its own "conduct unbecoming" standard, it has been in response to conduct such as refusing to return excess fees despite a Court order, *In re Gilbert,* 276 U.S. 294 (1928), and failing to respond to communications regarding a pending case, *In the Matter of Davis,* 289 U.S. 704 (1933). *See also In re Discipline of Clinton,* 534 U.S. 806 (2001) (mem.); 534 U.S. 1016 (mem.).

diligence); *In re Margolin,* 518 F.2d 551, 551 (9th Cir. 1975) (holding that undue delay in filing of appeal warrants discharge from further representation, imposition of fine, and indefinite suspension); *United States v. Ferrara,* 469 F.2d 83, 83 (9th Cir. 1972) (per curiam) (fining attorney for failure to prosecute appeal with due diligence pursuant to Rule 46(c)); *In re Chandler,* 450 F.2d 813, 814-15 (9th Cir. 1971) (suspending attorney for three years after first offence of gross negligence, which included the failure to perfect client's appeal and protect claim from default); *United States v. Smith,* 436 F.2d 1130, 1133 (9th Cir. 1970) (ordering suspension for failure to prosecute). Intentional conduct is not necessary for discipline under FRAP 46; lack of diligence that impairs the deliberations of the court is sufficient. *DCD Programs, Ltd. v. Leighton,* 846 F.2d 526, 528 (9th Cir. 1988).

Because we have jurisdiction over appeals from the immigration courts, the quality of the practice by attorneys appearing before the immigration courts is crucial to our ability to administer justice and function effectively. The quality of our review is heavily dependent on the record established in administrative immigration hearings, which in turn is dependent on the competence of the attorneys creating that record. Gadda's incompetence impedes our operations and endangers the rights of his clients.

In the course of one immigration matter, for example, Gadda neglected to introduce crucial documents relating to changed country conditions. *In re Gadda,* 2002 WL 31012596, at *11. Although his client was in possession of such documents, Gadda failed to have the documents translated and offered as evidence. *Id.* In that same matter, the Review Department found that Gadda failed to

elicit persuasive testimony in support of his client's contention of fear of future prosecution. *Id.* at *11-12. Gadda currently represents petitioners in approximately 50 matters pending before this court. We hold that conduct such as his before the immigration courts is sufficient to constitute "conduct unbecoming" a member of the bar of this court.

### C. Inherent Power

We hold that we also have inherent authority respecting the suspension and disbarment of attorneys who perform incompetently in federal immigration proceedings. *E.g.*, *Snyder,* 472 U.S. at 645 n.6 ("Federal courts admit and suspend attorneys as an exercise of their inherent powers; the standards imposed are a matter of federal law."); *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) ("Courts are endowed with inherent powers which are necessary to the conduct of their business, including the power to sanction."); *accord Comuso v. National R.R. Passenger Corp.*, 267 F.3d 331, 339 (3d Cir. 2001); *In re Bailey,* 182 F.3d 860, 864-65 (Fed. Cir. 1999); *Matter of Jacobs,* 414 F.3d 84, 87 (2d Cir. 1994); *Berger,* 983 F.2d at 724; *see generally* Judith A. McMorrow & Daniel R. Coquillette, Moore's Federal Practice, The Federal Law of Attorney Conduct, Ch. 807 (3d ed. 2001). This power derives from an attorney's role as an officer of the court which granted the attorney admission to the bar, *Theard,* 354 U.S. at 281; it is necessary to maintain the respectability and harmony of the bar, *Ex parte Burr, 9* Wheat. 529, 531 (1824), as well as to protect the public, *Theard,* 278 U.S. at 281. We exercise this power with restraint and discretion. *See Roadway Exp., Inc. v. Piper,* 477 U.S. 752, 764 (1980).

"[T]he behavior for which [an attorney] is disciplined [pursuant to our inherent power] must have some nexus with the conduct of the litigation before the court." *United States v. Wunsch,* 84 F.3d 1110, 1115 (9th Cir. 1996) (holding that the district court did not abuse its discretion by using its inherent power in the course of an ongoing proceeding to sanction a defense attorney who harassed an assistant United States Attorney following defense attorney's disqualification). Such a connection exists in the context of immigration proceedings because, as noted above, we have jurisdiction over appeals from the immigration courts and rely on the records established in those courts.[8]

## III

It is **ORDERED** that Miguel Gadda, Esq. should be and hereby is disbarred from the practice of law before the

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[8] Of course, our statutory and inherent powers to regulate attorneys admitted to the Ninth Circuit bar coexist with the separate, independent powers of federal administrative agencies to do the same. *Davy v. SEC,* 792 F.2d 1418, 1421 (9th Cir. 1986) ("[A]gencies have been given the power to police the conduct of those who practice before them."); *see also Checkosky v. SEC,* 23 F.3d 452, 456 (D.C. Cir. 1994) (citing *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 122 (1926)); *Koden v. United States Dept. of Justice,* 564 F.2d 228, 233 (7th Cir. 1977) ("It is elementary that any . . . administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct."). *But cf. Hustedt v. Workers' Comp. Appeals Bd.,* 636 P.2d 1139, 1146 (Cal. 1981) (holding that law granting state administrative agency the power to prohibit attorneys from practicing before the agency or any of its judges unconstitutionally restricts the state supreme court's inherent power to discipline attorneys). In the case of agencies, this power, though limited, exists whether or not expressly authorized by statute. *Touche Ross & Co. v. SEC,* 609 F.2d 570, 582 (2d Cir. 1979).

United States Court of Appeals for the Ninth Circuit and his name shall be stricken from the roll of attorneys, all pursuant to FRAP 46(b)(1)(A), (B).

Within 21 days of the date of this order, respondent Gadda shall file notices of withdrawal in all cases pending in this court in which he is listed as counsel of record as of June 1, 2004, serve this order and the court's April 1, 2004 order and opinion on his clients in the pending cases, and turn over all client files and materials to the clients. Respondent Gadda shall inform his clients in the pending cases that they must (1) obtain new counsel; or (2) notify the court that they wish to represent themselves; or (3) request that the court appoint counsel for them. He shall further notify them that he can no longer provide any legal assistance for them and may not collect fees for future services. Also within 21 days of this order, respondent Gadda shall file proof with the court that he has completed the above requirements and send to the court the addresses of his clients in all pending cases.

With the above amendments, Gadda's motion is denied. No motions for reconsideration, rehearing, clarification, modification, or stay of the mandate shall be filed or entertained. The mandate shall issue forthwith.

Failure to comply with this order within the time permitted will result in the imposition of monetary sanctions of not less than $1,000, without further notice, for each case in which respondent Gadda fails to fulfill the requirements of this order.

The Clerk shall serve copies of this order on the Clerks of the United States Supreme Court and the United States District Court for the Northern District of California; on the State Bar of California, Attention: Enforcement

Department, 180 Howard Street, San Francisco, CA, 94105; and on the Executive Office for Immigration Review, Office of the General Counsel, Attention: Bar Counsel, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041. *See* 9th Cir. R. 46-2(g).

The Clerk shall serve this order on Gadda by telephone and by certified mail, return receipt requested.

**DISBARRED.**

2001 WL 1602693 (N.D.Cal.)

United States District Court, N.D. California.

MIGUEL GADDA, Petitioner,

v.

JOHN ASHCROFT, U.S. Attorney General, et al., Respondents.

No. C-01-3885 PJH.

Dec. 7, 2001.

ORDER DENYING PETITION FOR PRELIMINARY INJUNCTION

HAMILTON, District J.

Now before the court is the petition of attorney Miguel Gadda for a preliminary injunction to compel the Board of Immigration Appeals to stay its order suspending him from practicing before the Immigration Courts, the Immigration and Naturalization Service ("INS"), and the Board of Immigration Appeals ("BIA"), and to cease publicizing the order of suspension. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

## INTRODUCTION

Petitioner Miguel Gadda ("Gadda") was admitted to practice in the State of California in 1975, and has practiced immigration law exclusively since being admitted. In July and August 2000, the Office of the Chief Trial Counsel of the State Bar of California filed formal charges of professional misconduct against Gadda in numerous immigration cases and one client trust account case.

Gadda filed responses to the charges, and a trial followed in March 2001.

On July 30, 2001, the State Bar judge issued a written decision finding that Gadda had failed to perform legal services with competence, failed to respond to clients, failed to promptly return unearned fees, failed to return client files, engaged in an act of moral turpitude, and commingled client funds, in violation of the Rules of Professional Conduct of the State Bar of California. Noting that Gadda had been disciplined in 1990 for similar conduct, and finding that the evidence before the court established a pattern of misconduct in which Gadda had intentionally, recklessly, and/or repeatedly failed to perform legal services with competence in nine separate client matters over a six-year period, the State Bar judge recommended that Gadda be disbarred and ordered pursuant to California Business & Professions Code § 6007(c)(4)[1] and State Bar Rule of Procedure 220(c)[2] that he be transferred to involuntary inactive status. Gadda filed a request for review with the State Bar Review Department, and that matter is pending. He did not request a stay of the order of involuntary inactive enrollment.

On September 14, 2001, the Executive Office for Immigration Review ("EOIR") filed a petition for immediate

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[1] "The board [of Governors of the State Bar] shall order the involuntary inactive enrollment of an attorney upon the filing of a recommendation of disbarment after hearing or default." Cal. Bus. & Prof.Code § 6007(c)(4).

[2] "If the [State Bar] Court recommends disbarment, it shall also include in its decision an order that the respondent be enrolled as an inactive member pursuant to Business and Professions Code 6007, subdivision (c)(4)." State Bar R. Proc. 220(c).

suspension of Gadda from practicing before the BIA and the Immigration Courts, pursuant to 8 C.F.R. § 3.103(a)(1). On September 20, 2001, a similar petition was filed by the INS seeking suspension of Gadda from practice before it. On October 2, 2001, the BIA noted that the California Bar Court had recommended disbarment for Gadda and had ordered that he be placed on involuntary inactive enrollment by the State of California. The BIA granted the petition to suspend Gadda from practice, and directed him to promptly notify clients with cases pending before the BIA, the Immigration Courts, and the INS that he had been suspended from practicing before those bodies. The BIA also directed that its order be made public.

On October 3, 2001, Gadda's name was placed on the list of suspended or expelled attorneys on the BIA's website. On October 10, 2001, Gadda filed a request for reconsideration with the BIA, in which he argued that the BIA should not have entered an immediate order of suspension against him. On October 15, 2001, Gadda filed the complaint in the above-entitled action, seeking a temporary restraining order and a preliminary injunction requiring the BIA to stay its order of suspension.[3] Gadda claims that his due process rights have been and continue to be violated because the BIA suspended him before the California Supreme Court had issued a final order of disbarment, and without first affording him the notice and hearing procedures set forth in the applicable federal regulations. Gadda maintains that he should be permitted

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[3] The court interprets this action for injunctive relief as a request for review under the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 706. *See Koden v. U.S. Dep't of Justice*, 564 F.2d 232 (7th Cir.1977).

to represent clients in immigration proceedings while the State of California disciplinary proceedings are in progress.

## DISCUSSION

### A. Legal Standard

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the petitioner, by a clear showing, carries the burden of persuasion. *See Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997). The standard balances the plaintiff's likelihood of success on the merits against the relative hardship to the parties. *Sun Microsystems, Inc. v. Microsoft Corp.,* 188 F.3d 1115, 1119 (9th Cir.1999). A court may also issue a preliminary injunction if it determines either that the moving party is likely to succeed on the merits and a possibility of irreparable injury exists, or that the moving party raises serious questions on the merits and the balance of hardships tips sharply in the moving party's favor. *Id.* (citing *Sega Enters. Ltd. v. Accolade, Inc.,* 977 F.2d 1510, 1517 (9th Cir.1992)). This second framework does not provide two separate tests, but rather represents the extremes of the continuum of equitable discretion – the greater the relative hardship to the moving party, the less probability of success must be shown. *Id.* Depending on the nature of the case, the court may also consider whether the public interest favors granting the relief requested. *Johnson v. Calif. State Bd. of Accountancy,* 72 F.3d 1427, 1430 (9th Cir.1995).

B. Petitioner's Request for Preliminary Injunction

1. Statutory and Regulatory Background

The Immigration and Naturalization Act of June 27, 1952, created the Immigration and Naturalization Service within the Department of Justice, and charged the Attorney General of the United States with the administration and enforcement of the Act and all laws relating to the immigration and naturalization of aliens. *See* 8 U.S.C. §§ 1101(a)(34), 1103. The Commissioner of the INS is appointed by the President with the advice and consent of the Senate, and is charged with the administration of the INS. 8 U.S.C. § 1103(b). The Commissioner is also charged with all responsibilities and authority conferred on the Attorney General as may be delegated by the Attorney General or which may be prescribed by the Attorney General. *Id.*

Congress delegated to the Attorney General the authority to promulgate rules and regulations relating to the enforcement and administration of the Immigration and Naturalization Act. 8 U.S.C. § 1103(a). The Attorney General has in turn delegated such authority to the BIA and the INS. *Patel v. Immigration and Naturalization Service,* 638 F.2d 1199, 1201 n. 1 (9th Cir.1980); *see also* 8 C .F.R. §§ 2.1, 3.1. The Director of the Executive Office for Immigration Review ("EOIR") is responsible for the general supervision of the BIA and the Office of the Chief Immigration Judge in the execution of their duties. 8 C.F.R. § 3.0.

Under the provisions of 8 C.F.R. §§ 3.16 and 292.1, only certain designated individuals are authorized to represent persons before the INS, the Immigration Courts, and the BIA. The EOIR and the INS have promulgated

regulations pertaining to professional conduct of "practitioners." *See* 8 C.F.R. § 3.101, et seq. A "practitioner" is any attorney as defined in 8 C.F.R. § 1.1(f), who does not represent the federal government, or any representative as defined in 8 U.S.C. § 1.1(j). The term "attorney" is defined as "any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting [such person] in the practice of law." 8 U.S.C. § 1.1(f). The regulations authorize the BIA to impose disciplinary sanctions against any practitioner "if it finds it to be in the public interest to do so." 8 C.F.R. §§ 3.101(a), 292.3(a)(1).

The grounds for which a practitioner "shall" be subject to disciplinary sanctions in the public interest are listed at 8 C.F.R. § 3.102 (but the categories listed "do not constitute the exclusive grounds for which disciplinary sanctions may be imposed"). The grounds listed include charging or receiving grossly excessive fees; bribing any person to commit an act or to refrain from committing an act in connection with any immigration proceeding; knowingly making false statements concerning any material matter relating to an immigration proceeding; soliciting professional employment through the use of runners; being subject to a final order of disbarment or suspension, or having resigned with an admission of misconduct in the jurisdiction of any state in which the practitioner is admitted to practice; knowingly making false statements in connection with his or her qualifications; engaging in frivolous behavior in any immigration proceeding; and engaging in conduct that constitutes ineffective assistance

of counsel in any immigration proceeding. 8 C .F.R. § 3.102(a), (b), (c), (d), (e), (f), (j), (k).

The regulations set forth procedures for immediate suspension and summary disciplinary proceedings. Either the Office of the General Counsel of the EOIR, *see* 8 C.F.R. § 3.103(a)(1), or the Office of the General Counsel of the INS, *see* 8 C.F.R. § 292.3(c)(1), may file a petition with the BIA to suspend from practice any practitioner who has been found guilty of a serious crime, or who has been "disbarred or suspended on an interim or final basis by, or who has resigned with an admission of misconduct from, the highest court of any state, possession, territory, commonwealth, or the District of Columbia, or any Federal court." 8 C.F.R. §§ 3.103(a)(1), 292.3(c)(1).

> Upon the filing of a petition for immediate suspension, together with a certified copy of a court record finding that the practitioner has been found guilty of a serious crime or has been so disciplined or has so resigned, the Board shall forthwith enter an order immediately suspending the practitioner from practice before [the BIA, the Immigration Courts, and/or the INS] notwithstanding the pendency of an appeal, if any, of the underlying conviction or discipline, pending final disposition of a summary disciplinary § proceeding as provided [in the regulations].

8 C.F.R. §§ 3.103(b), 292.3(c)(3).

In addition, the Office of the General Counsel of the EOIR or the Office of the General Counsel of the INS "shall promptly initiate summary disciplinary proceedings" against any practitioner against whom an order of immediate suspension has been entered, as described above. 8 C.F.R. §§ 3.103(b), 292.3(c)(3). Such proceedings

are initiated by the issuance of a notice of intent to discipline, accompanied by a certified copy of the order or record evidencing the underlying criminal conviction or discipline.

The regulations also provide procedures for the filing of complaints with the EOIR and the INS by individuals alleging unprofessional conduct by practitioners who are authorized to practice before those bodies. 8 C.F.R. §§ 3.104, 292.3(d). Both summary proceedings and disciplinary proceedings initiated by the filing of a complaint by an individual are conducted in accordance with the procedures set forth in 8 C.F.R. §§ 3.105 and 3.106 (allowing the practitioner to file an answer and setting forth hearing and disposition).

The regulations provide further that in the case of a summary proceeding based on a final order of disbarment or suspension, or a resignation with an admission of misconduct, a certified copy of the judgment or order of discipline establishes a rebuttable presumption of the professional misconduct. Disciplinary sanctions "shall" follow in such a proceeding unless the attorney can rebut the presumption by demonstrating by "clear, unequivocal, and convincing evidence" that the underlying disciplinary proceeding constituted a deprivation of due process, that there was an extreme "infirmity of proof" establishing the attorney's misconduct, or that the imposition of discipline by the adjudicating official would result in grave injustice. 8 C.F.R. §§ 3.103(b)(2), 292.3(c)(3)(ii).

2. Analysis

Gadda seeks an order requiring the BIA to stay the order of immediate suspension until it has ruled on his

motion for reconsideration or until a final order of discipline has been issued by the California Supreme Court. He argues that the BIA's issuance of the order of suspension was unlawful for two reasons. First, he claims that the provisions in the regulations regarding immediate suspension do not apply in his case because he has not been suspended or disbarred from practice in the State of California. Second, he asserts that the EOIR and the INS violated their own regulations by failing to initiate a summary disciplinary proceeding following the issuance of the order of suspension. The court finds that Gadda fails to show a likelihood of success on the merits, and that the request for a preliminary injunction must be denied on that basis.

Gadda first argues that the filing of the petition for immediate suspension in September 2001 was improper because he has not been disbarred or suspended by "the highest court" of any state, as provided by 8 C.F.R. § 3.103(a). Under the Constitution and laws of the State of California, only the California Supreme Court has the authority to regulate the practice of law in the state. *See In re Attorney Discipline Sys.*, 19 Cal.4th 582, 592 (1998). At the time the EOIR filed its petition, the State Bar Court had issued a written opinion recommending disbarment, but the recommendation had not become a final order of the California Supreme Court. Thus, Gadda claims, the provisions of 8 C.F.R. § 3.103(a)(1) do not apply in this case and the BIA acted without authority when it suspended him from practice.

The California Supreme Court has inherent power to discipline and disbar members of the California Bar. *See* Cal. Bus. & Prof.Code § 6087; Cal. R. Ct. 951(g). The California Supreme Court has delegated to the California

Bar the power to act on its behalf in disciplinary matters, subject to the court's review. Cal. Bus. & Prof.Code § 6087. The Board of Governors of the State Bar established the State Bar Court to act in place of the Board of Governors in disciplinary and reinstatement proceedings. Cal. Bus. & Prof.Code § 6086.5. State Bar determinations are advisory only, and the Supreme Court utilizes the State Bar Court "to conduct the preliminary investigation, hearing, and determination of complaints." *Id.* (citing *In re Attorney Discipline Sys.*, 19 Cal.4th at 599-60.

Because the State Bar Court is an administrative agency affiliated with the State Bar, and as such, is also an "administrative arm" of the California Supreme Court, *see Lebbos v. State Bar,* 53 Cal.3d 37, 47-48 (1991), the State Bar Court "exercises none of [the Supreme Court's] inherent authority over attorney discipline," and "the judicial power in disciplinary matters remains with [the Supreme Court]." *In re Rose,* 22 Cal.4th 430, 442 (2000). The State Bar is limited to making recommendations to the Supreme Court, and this limitation upon the State Bar Court's authority "distinguishes it from other quasi-judicial or administrative agencies rendering initial decisions – rather than recommendations – that subsequently may be reviewed by courts of record." *Id.* at 439.

The State Bar Court is organized into a Hearing Department, which conducts evidentiary hearings on the merits in disciplinary matters, and the Review Department, which serves generally as the administrative appellate body within the State Bar Court. Following the hearing, the Hearing Department issues a written decision recommending whether the attorney should be disciplined. State Bar R. Proc. 220. Any disciplinary decision of the Hearing Department is fully reviewable by the Review

Department at the request of the attorney or the State Bar. State Bar R. Proc. 301(a). Provisions regarding review of State Bar Court decisions recommending suspension or disbarment are found in the Business and Professions Code and the California Rules of Court. *See In re Rose,* 22 Cal.4th at 440-41.

At issue in this case is whether the requirement that the State Bar Board of Governors order the involuntary inactive enrollment of an attorney upon the filing of a recommendation of disbarment after a hearing or default, Cal. Bus. & Prof.Code § 6007(c)(4), qualifies as order of suspension or disbarment on an interim or final basis by the highest court in the state under INS/BIA regulations. Gadda contends that it does not, and that the provisions of 8 C.F.R. § 3.103(a)(1) therefore do not apply to permit the BIA to order him suspended from practice before the INS, the Immigration Courts, and the BIA. The court finds, however, that the practical effect of an order of involuntary inactive enrollment, *see* Bus. & Prof.Code § 6006, is to suspend the attorney from the practice of law in the State of California on an interim basis. Acting as an arm of the California Supreme Court, the State Bar Court is required to issue such an order whenever it makes a recommendation of disbarment.[4] The order terminates upon the Supreme Court's issuance of the final order of discipline.

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[4] Gadda does not directly challenge the lawfulness of § 6007(c)(4), although he does assert in his reply brief that because the State Bar has not provided a process under which an attorney placed on inactive enrollment under § 6007(c) can prove that he does not pose a present threat or harm to his clients or to the public, he has "no present remedy" [in California courts] from the inactive enrollment and "must therefore seek his remedies . . . in the Federal Courts." The California Supreme Court has noted, with regard to § 6007(c) generally, that a

(Continued on following page)

Because Gadda was in effect "suspended on an interim basis" by the State Bar pending the Supreme Court's action on the recommendation of disbarment, and has made no request to the State Bar or the California Supreme Court for a stay of the order, it appears to the court that the BIA was acting within the scope of its regulations when it issued its order of immediate suspension. Any court that has the power to admit attorneys to practice may also sanction them for unprofessional conduct. *Standing Comm. on Discipline of United States Dist. Court v.*

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State Bar Court decision ordering the involuntary inactive enrollment of an attorney under exigent circumstances may take effect even before the Supreme Court has issued a final order of discipline, "but only because the order is subject to our immediate, independent review." *In re Rose,* 22 Cal.4th 430, 442 n. 7 (citing *Conway v. State Bar,* 47 Cal.3d 1107, 1120-23 (1989)). Nevertheless, at least one treatise suggests that the effect of an order of involuntary inactive enrollment under § 6007(c)(4) (in contrast to the other provisions of § 6007(c)) is that "[t]here is no opportunity for the attorney to be heard on whether the involuntary inactive enrollment is necessary to protect clients or the public while the disbarment recommendation is being considered by the Supreme Court." Vopnek, Tuft, Peck & Wiener, *Professional Responsibility* (2000 ed.) §§ 11:1319-1320.

Gadda's claim of "no present remedy" suggests a challenge to the constitutionality of § 6007(c). However, were Gadda, in the present case, to raise the claim that the California scheme impermissibly prevents an attorney who has been placed on involuntary inactive enrollment pursuant to § 6007(c)(4) to seek immediate review of that order, this court would be required to abstain under the rule established by the United States Supreme Court in *Younger v. Harris,* 401 U.S. 37, 40-41 (1971). *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432-37 (1982) (abstention is appropriate where state bar disciplinary hearings within the constitutionally prescribed jurisdiction of a state supreme court constitute ongoing judicial proceedings, where those proceedings implicate important state interests, and where there is an adequate opportunity in the state proceedings to raise federal constitutional challenges); *see also Hirsch v. Justices of Supreme Court of Calif.,* 67 F.3d 708, 712-13 (9th Cir.1995) (citing *Middlesex,* 457 U.S. at 432).

*Ross,* 735 F.2d 1168, 1170 (9th Cir.1984). An administrative agency that has general authority to prescribe its rules of procedure may also set standards for determining who may practice before it. *Goldsmith v. United States Bd. of Tax Appeals,* 270 U.S. 117, 121 (1926). Under the plain language of the regulations, Gadda plainly does not qualify as an "attorney" who is permitted to represent individuals before the INS, the Immigration Courts, or the BIA because he is subject to the order of a court that has restricted him in his practice of law. *See Matter of Sparrow,* 20 I & N Dec. 920, 930 (1994). *See also* 8 C.F.R. §§ 1.1(f); 292.1(a)(1); 3.16(b).

Gadda maintains that the BIA's action was improper under the principles articulated by the Ninth Circuit *In re Kramer,* 193 F.3d 1131 (9th Cir.1999), where the court noted that while district courts have the authority to supervise and discipline the conduct of attorneys who appear before them, including "the inherent authority to suspend or disbar lawyers," such power must be exercised within the parameters of due process. *Id.* at 1132 (citations omitted). The *Kramer* court relied on the Supreme Court's decision in *Selling v. Radford,* 243 U.S. 46, 50-51 (1917), which held that a federal court could impose reciprocal discipline on a member of its bar based on a state's disciplinary adjudication, if an independent review of the record reveals no deprivation of due process, sufficient proof of misconduct, and no grave injustice resulting from the imposition of such discipline. *In re Kramer,* 193 F.3d at 1132. Gadda contends that under this rule, the BIA's institution of summary suspension violated his due process rights because the BIA did not conduct an independent review of the State Bar court's decision, and did not provide him opportunity to be heard.

The due process clause does not require a hearing on disbarment from a federal court when the conduct complained of was the subject of a state disciplinary hearing, so long as the state hearing comported with due process. *Selling,* 243 U.S. at 50-51. In this case, Gadda was given notice and ample opportunity to be heard. The State Bar Court conducted an evidentiary hearing over a nine-day period, and issued a 37-page written decision. The written decision includes a thorough discussion of the facts in each of the charges brought against Gadda. The BIA determined, based on the State Bar Court's decision and the declaration of the State Bar's Assistant Chief Trial Counsel, that Gadda had been placed on inactive enrollment status by the State Bar.

Courts must give strong deference to administrative agencies' constructions of applicable regulations. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44 (1984). For purposes of this request for a preliminary injunction, the court finds that Gadda has not demonstrated a likelihood of success on the merits. In addition, while the BIA's order of suspension certainly presents a hardship for him in that it prevents him from practicing immigration law, the court finds that the public and the courts have an even stronger interest in preventing attorneys who have been found to have committed numerous violations of the rules of professional conduct from representing clients. Under California law, the State Bar Court's recommendation that an attorney be disbarred creates a presumption that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public, such that the State Bar places the attorney on inactive status pending the final entry of the order of disbarment. Whatever hardship

Gadda may suffer is of his own making, and it does not "tip the balance" in his favor when measured against the weak likelihood of success of his claim, and the strong public interest in protecting the public from inadequate legal representation.

Finally, with regard to Gadda's contention that the EOIR and the INS acted in violation of their regulations in failing to "promptly initiate summary disciplinary proceedings" following the BIA's issuance of the order suspending him from practice, the court finds that this argument is irrelevant to the question whether Gadda is likely to prevail in his claim that he was wrongfully suspended from practice before the INS, the Immigration Courts, and the BIA.

## CONCLUSION

In accordance with the foregoing, the court finds that petitioner's request for a preliminary injunction must be DENIED.

The petition having been denied, and petitioner having requested no relief beyond entry of a preliminary injunction, this action is hereby DISMISSED. The clerk is ordered to close the file.

IT IS SO ORDERED.